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ABSTRACT

This paper contains an analysis of Justice William Brennan's Supreme Court opinions concerning cases on freedom of expression and his interpretations of Alexander Meiklejohn's theory of actual malice in cases of libel. Particular attention is paid to Brennan's landmark contribution to the law of libel, his opinion in "New York Times v. Sullivan," and analytical criticism of this opinion. Later cases are examined to determine any changes in Brennan's interpretation of actual malice, as well as to examine the impact of his "libel formula" on a narrowing view of public issue and public official defamation. The concluding section of the paper indicates that Brennan's history of using Meiklejohnian theory demonstrates the difficulties inherent in the theory and why it has failed. (RL)

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WILLIAM BRENNAN AND THE FAILED "THEORY" OF ACTUAL MALICE

by

Donald M. Gillmor

I

Russell Baker predicts that the nation will probably expire of terminal jurisprudence before the turn of the century -- if it does not first expire of terminal communication. The law deals in incomprehensibility. "The lawyer's nature," says Baker, "is to make things more complicated. If you think it's simple, he will smile and show you it's complex. Admit it's complex, and he will smile and show you it's incomprehensible . . ." But, "if lawyers make things complicated, the journalist's sin lies in making them too simple. Somewhere in the middle ground lies sanity, but our chances of getting there are not bright."[1]

If the journalist's task, then, is to avoid simplemindedness, Justice William J. Brennan's is to keep the law from becoming too complicated. "Paradoxical," he conceded, was his partial dissent in Herbert v. Lando.[2] It was. But it is not Brennan's complexity that invites attention: rather, it is his Bronowskian sense of intellectual struggle and his dogged pursuit of workable theories of freedom of expression. The purpose here is to suggest why the admirable Justice seems to have failed in one of these explorations: the search for a scale on which to weigh defamatory public speech against the constitutional dictates of the First Amendment.

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1. Baker, "Terminal Jurisprudence," New York Times Magazine, March 20, 1977, p. 12.

2. 441 U.S. 153, 99 S. Ct. 1635 (1979).

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As his teacher and later colleague Felix Frankfurter said of him: "I always wanted my students to think for themselves, but Brennan goes too far."[3] An unintended compliment perhaps. A less charitable Dean Griswold declared that Brennan's role of compromiser and accommodator earned his opinions "academic criticism for lack of logical purity or the absence of consistent policy."[4] That he did on occasion lack logical consistency accords with his distaste for dogma, or perhaps reflects his intellectual initiative. When tempted by absolutism he would look for the redeeming qualifier. A compromiser he has been, although a compromiser might not have gone as far as Brennan did in his plurality opinion for the Court in the Rosenbloom libel case,[5] an opinion that was to bring him as close as he ever came -- and too close for most of his colleagues -- to the Meiklejohnian theory he embraced in part in an April 14, 1965 lecture at Brown University.

In his Alexander Meiklejohn lecture Brennan paid tribute to the philosopher's revolutionary idea that freedom of expression must be absolute in areas of public affairs. Meiklejohn had granted, however, that the speaker might have "to conform to the necessities of the community with respect to time, place, circumstance, and manner of procedure, as long as these were not mere covers for attempts to suppress speech he (Meiklejohn) classified

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3. Stephen J. Friedman, William J. Brennan: An Affair With Freedom. New York: Atheneum, 1967, pp. 6-7.

4. Ibid., p. 352.

5. Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811 (1971).

as having 'governing importance'."[6] In modified form, Brennan would restate these notions about collateral limitations on speech in a 1979 Rutgers University address.

Where speech of "governing importance" was involved, said Meiklejohn, that is, speech on public issues, words that are part of the thinking process of the community, no clear and present danger or balancing tests, no tests of redeeming social importance would be allowed. In the heart of his doctrine, Meiklejohn believed that, while the First Amendment gives no protection to private defamation,

> If . . . the same verbal attack is made in order to show unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structures of the Constitution. These are "public" issues concerning which, under our form of government, he has authority, and is assumed to have competence to judge. Though private libel is subject to legislative control, political or seditious libel is not. (Emphasis added).[7]

Certainly a major premise of New York Times v. Sullivan,[8] Brennan's landmark contribution to the law of libel, is Meiklejohn's recognition that protected public speech is crucial to self government. In the summer of 1964, just weeks before his death, Meiklejohn said to the late Harry Kalven, Jr., the University of Chicago's eminent First Amendment scholar, that New York Times was "an occasion for dancing in the streets."

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6. Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L.R. 1, 5, 13-14 (November 1965).

7. Ibid., Brennan, pp. 13-14, quoting Meiklejohn, "The First Amendment Is An Absolute," 1961 Supreme Court Review, 245, 257 (Kurland ed.).

8. 376 U.S. 254, 84 S. Ct. 710 (1964).

Meiklejohn could only have been making a preliminary and relative judgment, for, as Kalven noted, "At this point in its rhetoric and sweep, the opinion almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official."[9] (Emphasis added.) Almost, but not quite! Brennan's qualification was not clear and present danger or redeeming social importance, but the actual malice test. And it would turn out to be a prodigious demurrer. Why the divergence from his philosophical mentor?

Brennan, the gradualist, was chary of radical shifts in judicial doctrine. Furthermore, he agreed with Benjamin Cardozo that "Complete freedom -- unfettered and undirected -- there never is. A thousand limitations -- the product some of statute, some of precedent, some of vague tradition or of an immemorial technique -- encompass and hedge us even when we think of ourselves as ranging freely and at large."[10] But he had philosophical reasons of his own for going slow, reasons that distance him considerably from what Meiklejohn seemed to be saying. In Garrison[11] Brennan had written:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.[12]

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9. Kalven, "The New York Times Case: A Note on the Central Meaning of the First Amendment," 1964 Supreme Court Review 191, 209 (Kurland ed.).

10. Op. cit., Brennan, p. 10.

11. 379 U.S. 64, 85 S. Ct. 209 (1964).

12. Op. cit., Brennan, p. 19, citing his own opinion for the Court.

Order and morality should, said Brennan, outweigh any slight social or "governing" value that calculated falsehood might have in the search for truth. Perhaps Brennan perceives truth as objectified reality, emerging from the natural law theory he has professed,[13] an essential substance of self-government and self-realization more vital than any of its forms. Thus the actual malice qualification for otherwise protected public speech.

It was Black, Douglas and Goldberg in their concurring opinions in New York Times and Garrison, and Thomas I. Emerson in his brusque reaction to these landmark rulings, who held the Meiklejohn line. "The requirement that malice be proved," said Black of New York Times, "provides at best an evanescent protection for the right critically to discuss public affairs and does not measure up to the sturdy safeguard embodied in the First Amendment." Emerson called Brennan's actual malice test a "relapse to the two level theory (the notion that certain forms of speech are exempt from First Amendment protection)," and "inconsistent with basic First Amendment theory." Brennan's view seemed to disregard another tenet of First Amendment theory -- that it is no part of the government's business to decide for the citizen-critic what is of social value in communication and what is not. "(S)uper-refined attempts to separate statements of fact from opinions," said Emerson, "to winnow truth out of a mass of conflicting evidence, . . . to probe into intents, motives and purposes -- all these do not fit into the dynamics of a

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13. Brennan, "The Role of the Court -- the Challenge of the Future," Edward Douglass White Lecture, Georgetown University Law Center, March 19, 1965, reprinted in Friedman, note 3, pp. 315, 322.

system of freedom of expression . . . The health and vitality of the system depend more upon untrammeled freedom of discussion, in which all citizens contend vigorously, than in judicial attempts to establish the motives of participants."[14]

Brennan and his actual malice test were apparently on a solo flight. Meiklejohn's absolute protection of defamatory expression in the realm of public affairs had been rejected by Brennan for a conditional standard -- "with knowledge that it was false or with reckless disregard of whether it was false or not" -- which in fact is two standards within a single definition of actual malice.

With Meiklejohn, Kalven took great comfort in the apparent damage New York Times had done to the ancient crime of seditious libel, but it is clear that he regarded Brennan's ruling as no more than a step, albeit a long one, toward the Meiklejohnian ideal.

"It is not easy to predict," he wrote, "what the Court will see in the Times opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming. If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now."[15] (Emphasis added.)

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14. Emerson, The System of Freedom of Expression. New York: Vintage Books, 1970, pp. 530, 531, 538.

15. Op. cit., Kalven, p. 221.

A pretty fair prediction nevertheless. Brennan's subsequent opinions for the Court did stretch the actual malice test to include public figures, then matters in the public domain, like art, although the art in the 1971 Rosenbloom case was pulp magazine nudity. Meiklejohn's ideal would never be reached, however, because Brennan's actual malice rule intervened, a rule that would inform his First Amendment theory, a slender reed of a theory, and one that he would have to defend against recurrent attack.

Actual malice, a concept well established in common law and much discussed in America ever since passage of the Sedition Act of 1798, had long been defined as "well knowing" or "designed" falsity. In New York Times, Brennan relied on the influential opinion of Judge Rousseau Burch for the Kansas Supreme Court in a 1908 case, Coleman v. MacLennan.[16] Although Judge Burch's thresholds for state interference with freedom of the press were much lower than today's judicial norms, he did speak of the need for a plaintiff to show actual malice when matters of public interest were involved. By 1964 at least six states and a number of legal commentators, had adopted or favored what had evolved from the 19th century as a more liberal but still minority rule of public official defamation.

In the 1959 case of Barr v. Matteo[17] the Court extended absolute immunity to public officals for defamation uttered in the discharge of their public duties because it was "thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do

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16. 98 P. 281 (Kan. 1908).

17. 360 U.S. 564, 79 S. Ct. 1335 (1959).

their duty to the constant threat of retaliation."[18] Surely then, if a central meaning of the First Amendment was as Madison declared "that the censorial power is in the people over the Government, and not in the Government over the people,"[19] the citizen and the press would have a reciprocal immunity from retaliation for criticism of official conduct. But it was in the concurring opinions of Justices Black, Douglas and Goldberg in New York Times that one found support for the syllogism, not in Brennan's opinion. For Brennan, absolutes were unattractive; knowing or reckless falsehood would have to qualify any such immunity.

Brennan's constitutional position did shift the burden of proof to the public official plaintiff, it did raise the standard of proof to one of "convincing clarity," and, most importantly perhaps, it authorized reviewing courts to make an independent examination of the record to assure that the plaintiff had satisfied the constitutional standard.

What more does Brennan tell us about the actual malice rule in later cases? In Garrison he holds that speaking out of hatred, ill will or emnity, or a wanton desire to injure is not enough. He then improvises on his own New York Times definition by referring to actual malice as "false statements made with (a) high degree of awareness of their probably falsity," as "calculated falsehood," and as "the lie. knowingly and deliberately published about a public official." The "probability" factor did suggest some latitude for confused juror speculation on a standard of evidence somewhat lower than that of "convincing clarity."

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18. The language is Judge Learned Hand's in Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949).

19. 4 Annals of Congress 934 (1794).

While accepting the Court's conclusion, Black and Douglas, here and in later cases, rejected the gloss put on freedom of speech and the room it would leave for jurors to balance away First Amendment freedoms. Meiklejohn, I believe, would have agreed with that view.

In footnotes to his opinion for the Court in Rosenblatt v. Baer,[20] and in later cases, Brennan intimated that voluntariness in seeking public attention could be a factor in future cases and that a person's governmental position must be one that would invite public scrutiny and discussion. By 1971 he had abandoned these elements of vulnerability.

Consistent with his earlier libel holdings, Brennan concurred in Walker and dissented from Butts[21] and its "prudent publisher" test. Although a false-light privacy case, Brennan's opinion for the Court in the 1967 case of Time, Inc. v. Hill[22] clearly indicated that he was moving toward the "public issue" standard that he would offer in Rosenbloom.

"We hold," he wrote in Hill, "that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

That standard came into its own in Brennan's opinion for a plurality of the Court in Rosenbloom, a case that marks the longest reach of the actual malice test. "If a matter is a subject of public or general interest," he wrote, "it cannot suddenly become less so merely because a private individual

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20. 383 U.S. 75, 86 S. Ct. 669 (1966).

21. Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130, 87 S. Ct. 1975 (1967).

22. 385 U.S. 374, 87 S. Ct. 534 (1967).

is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."

The breadth of application of the test was Meiklejohnian. The test itself was not.

"If the States fear that private citizens will not be able to respond adequately to publicity involving them," Brennan added in a sentence that would miscue Jerome Barron in believing that he had one vote on the Court for his access theory, "the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

Rosenbloom was Brennan's watershed in libel as Ginzburg[23] had been in obscenity. The Court was fragmented. Not even his liberal colleague Thurgood Marshall could countenance this sweep of the actual malice test. From this point, Justice Brennan moved to the dissenting side in major libel cases. A pinched application of his actual malice test would be all that was left of his libel formula, but he was prepared to defend this tatter against the hurricane of contrary doctrine. That opportunity came in Gertz v. Robert Welch, Inc.[24] Dissenting, Brennan mounted a vigorous appeal for his Rosenbloom rule:

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23. Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942 (1966).

24. 418 U.S. 323, 94 S. Ct. 2997 (1974).

> I reject the argument that my Rosenbloom view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." I noted in Rosenbloom that performance of this task would not always be easy. But surely the courts, the ultimate arbiters of all disputes concerning classes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that "sizeable body of cases, decided both before and after Rosenbloom, that have employed the concept of a matter of public concern to reach decisions . . . in cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied Butts to the alleged libel of a public figure." . . . The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept would be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

Two years later in Firestone,[25] a case in which the Court further narrowed the public person category, the tone of Brennan's dissent verged on the desperate:

> The extension of the relaxed standard of Gertz to news reporting of events transpiring in and decisions arising out of public judicial proceedings is unwarranted by the terms of Gertz itself, contrary to other well-established precedents of this Court and, most importantly, savaging of the cherished values encased in the First Amendment. There is no indication in Gertz of any intention to overrule the Rosenbloom decision on its facts. Confined to those facts, Rosenbloom holds that in instances of erroneous reporting of the public actions of public officials, the New York Times actual malice standard must be met before liability for defamation may be imposed in favor of persons affected by those actions. Although Gertz clearly altered the broader rationale of Rosenbloom, until the Court's decision today it could not have been supposed that Rosenbloom did not remain the law . . .

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25. Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958 (1976).

But Rosenbloom had not remained the law, and soon Emerson's immediate post-New York Times criticisms would illuminate the pitfalls of the actual malice test.

Brennan dissented only in part in Herbert v. Lando. Standing on what by now might have seemed to him like the wreckage of his New York Times formulation, he was determined to salvage what remained of it. Actual malice, if it were to have any meaning at all, must permit the judicial probing of an editor's mind -- although Brennan had not had to face this dismal prospect in earlier cases.

Lawyers, he noted, would be "demoralized" without a qualified privilege to protect their work products; law enforcement would be ineffective without a qualified "informer's privilege." Nevertheless, said Brennan, "It would be anomalous to turn substantive liability on a journalist's subjective attitude (the actual malice test) and at the same time to shield from disclosure the most direct evidence of that attitude." The actual malice test had finally demonstrated its boomerang quality. Brennan had to admit that any chill on publication, or on that great tradition of free press he attributes in footnotes to Erskine, Brandeis, Holmes, Chafee, Meiklejohn, Bickel, Blasi, and opinions of the Court itself, "emanates chiefly from the substantive standard of New York Times, not from the absence of an editorial privilege." Brennan's words could be construed as a reluctant admission that the actual malice test had indeed had unforeseen consequences.

Brennan's partial dissent in Herbert v. Lando was a challenge to many readers. Surprisingly, he defined the interior mental sets of newspersons as unprivileged matters of fact which, if regulated, would regulate expression itself. But if mental processes can't be regulated, they can be probed.

In their opinions for the Court of Appeals,[26] Judges Kaufman and Oakes, while acknowledging that "knowing falsehood" and its parent concept of malice had always implied the reading of a defendant's mind by hunch, impression, inference, or what Oakes has since called the "inquisition of Galileo,'[27] it had nevertheless closed the door to any such probing, on the assumption that exposure of subjective thought processes would chill journalistic endeavor completely. Brennan could not go that far and preserve the actual malice test.

A chill would result, said Brennan, only from pressures that would cause journalists to cease working altogether. It was unlikely that the actual malice test would do this. It certainly hadn't in the Herbert case.

Brennan also argued, in his unusually complex opinion, that the editorial process writ large, that is predecisional or deliberative judgments and interactions among editors, the unending talk of the newsroom, was privileged in the absence of prima facie evidence of defamatory falsehood. Under Brennan's rubric, then, what one says in the newsroom may be better protected than what one thinks. This is an alarming outcome. One might have expected that, if there was to be probing, it would have been of the conscious rather than the unconscious mind.

Balancing precariously on a high wire suspended between press freedom and the right to reputation, Brennan was looking for a compromise that would preserve what was left of the actual malice rule. It was becoming a more difficult and lonely judicial act to perform.

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26. Herbert v. Lando, 568 F. 2d 974 (2d Cir. 1977).

27. James Oakes, "Actual Malice in Defamation Actions: An Unsolved Dilemma," 7 Hofstra L. Rev. 655 (Spring 1979).

In Wolston v. Reader's Digest Association, Inc.[28] Justice William Rehnquist for the Court, consistent with his Firestone holding, further restricted application of the actual malice test. And in Hutchinson v. Proxmire[29] Chief Justice Warren Burger, in what some observers have interpreted as a catastrophic footnote, cleared the way, by casting doubt on the validity of the summary judgment rule, for jurors as well as plaintiff's attorneys to probe a defendant's state of mind. (Where no facts are in dispute, a judge will decide questions of law in response to a motion for summary judgment, and in libel the actual malice issue is an issue of constitutional law.) Both rulings were flank attacks on the fundamental meaning of New York Times.

Brennan dissented briefly and weakly in both cases. Contemplating the near ruin of his actual malice rule, Brennan might have felt as he apparently felt in 1973 when the Court in Miller v. California[30] toppled the carefully crafted constitutional structure he had been fashioning in obscenity law since 1957. "I am convinced," he wrote in a marvelously comprehensive dissent in a companion case, Paris Adult Theatre I v. Slaton,[31] "that the approach initiated 15 years ago in Roth v. United States,[32] and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from

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28. 443 U.S. 157, 99 S. Ct. 2701 (1979).

29. 443 U.S. 111, 99 S. Ct. 2675 (1979).

30. 413 U.S. 15, 93 S. Ct. 2607 (1973).

31. 413 U.S. 49, 93 S. Ct. 2628 (1973).

32. 354 U.S. 476, 77 S. Ct. 1304 (1957).

that approach." Will Brennan find in his libel formulation the same confusion and obscurity that he believes led the Court to forge his obscenity theory into a weapon of suppression? Whatever the answer, Brennan is still not prepared to fall into the lap of absolutes in either area.

I

As long ago as 1965, in his Edward Douglass White lecture at Georgetown University Law Center, Brennan pleaded for the reading of a case before reacting to it. This fit with his protective attitude toward the Court and his eagerness to defend it against inaccurate and unwarranted criticism.

The near hysterical response of the press to Herbert v. Lando offended Brennan. The case had been a difficult one for him. It seemed that the press had misunderstood the meaning of the actual malice rule and, in its shrill and excessive reactions, may have misapprehended the Court itself. Perhaps the press did not appreciate the intellectual effort Brennan had expended in protecting First Amendment rights against the simplicity of the judicial left and the severity of the judicial right. Was this the inevitable fate of the compromiser?

Having said it all, the press could only be redundant in its reaction to Gannett v. DePasquale.[33] While there may have been more justification this time for the outrage of the press, Brennan saw Gannett as a Sixth Amendment rather than a First Amendment case.

Brennan's Newhouse Law Center address at Rutgers University on Oct. 17, 1979 is an admonition to the press that may have been building for

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33. 433 U.S. 368, 99 S. Ct. 2898 (1979). In Gannett the Supreme Court held that the media could not claim the protection of the Sixth Amendment's guarantee of public trial. In the process the Court confused distinctions one might make between a preliminary hearing and a trial.

some time. It is also, perhaps, and true to his spirit, a signal that he is off on a new intellectual exploration, this time toward a more general theoretical framework for freedom of speech and press. One finds in that framework strong reflections of Laurence Tribe's "Track One" and "Track Two" modes of analysis,[34] although neither Tribe's model nor his serious doubts about two-level theories, such as Brennan's actual malice test, is mentioned.

Tribe, a Harvard law professor and counsel for the petitioner in the post-Gannett case, Richmond Newspapers v. Virginia,[35] believes that two-level theories have been coming apart at least since Beauharnais,[36] Roth and New York Times. He substitutes for them a doctrine that attempts to differentiate between the right of a person to speak or publish directly and the right of that same person to go anywhere to gather news or to enjoy other privileges ancillary to the First Amendment.

When government aims at the purely communicative impact of conduct, Tribe asserts, the justifications which it may successfully advance in defense of its action must be truly extraordinary -- a clear and present danger, for example. This is essentially the "Track One" dimension of his analysis. On the other hand, when the government does not aim at ideas or information directly, that is, when it is content neutral, but seeks goals independent of communicative content or impact, even though there may be indirect constriction of the flow of ideas, it has substantial latitude.

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34. Tribe, American Constitutional Law. Mineola: Foundation Press Inc., 1978, Chapt. 12, "Rights of Communication and Expression."

35. ___ U.S. ___, 100 S. Ct. 2814 (1980). In Richmond the Court held that an arbitrary exclusion of the press from a public criminal trial is an abridgement of freedom of speech and press.

36. Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725 (1952).

This is the "Track Two" dimension of his analysis.

Brennan translates these in his Rutgers remarks into what he differentiates as the "speech" and "structural" models of the role of the press in society, models that he believes the press itself has confused. Under the "speech" model "the press requires and is accorded the absolute protection of the First Amendment." Under the "structural" model "the press' interest may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim."[37]

Is Brennan proposing, under his "speech" model, absolute protection for speech and press in what might be called pure speech circumstances? Is he after all adopting the theories of Meiklejohn and Emerson and the Court positions of Black and Douglas, what he calls the "heady rhetoric of absolutism," that would condone no conditions being placed on pure speech whatever its content? He is not. Brennan is not proposing absolute protection for speech. He is conditioning its use on the actual malice test, as Tribe would condition its use on the clear and present danger test. There is a gulf, however, between the two tests. Tribe's use of the clear and present danger test focuses on the broad, politically elastic interpretations of the abridger, Brennan's actual malice test on the more narrow intentions of the speaker. The latter cuts closer to the quick of freedom of speech and press.

Where non-speech or collateral elements of the communicative process are concerned, the "structural" model would offer broad but not absolute protection. A balancing of interests would be required. The "structural"

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37. For the complete Rutgers address see, William J. Brennan, Jr., "The Symbiosis Between the Press and the Court," The National Law Journal (October 29, 1979), p. 15.

model, like Tribe's "Track Two" framework, explains the outcome of a Branzburg case,[38] a Zurcher case,[39] and indeed a Herbert v. Lando case.

Is there any essential difference between a "Track One" and a "Track Two" analysis, between Brennan's "speech" and "structural" models? Meiklejohn, Emerson, Black and Douglas very likely would have said no. Each conditions the expression of "self-governing" ideas. Distinctions between the models may not be of fundamental importance and they may invite the very confusion that Brennan perceived in press responses to Herbert v. Lando, a case Brennan was convinced the press had misjudged.

"Judicial Agnewism," "legal nightmare," and "Orwellian domain" did not connote for him a reasoned response by the press. "The injury done to the press," he said, "was simply not of the magnitude to justify the resulting firestorm of acrimonious criticism. In its rush to cudgel the court, the press acted as if the decision imposed restrictions on what the press could say, as though the actual malice standard of Sullivan were overruled."

So Brennan, and the Court, remain entangled in the actual malice rule. The press may enjoy a qualified privilege to protect overt conversations among editors, but there is nothing special about the journalist's state of mind. "Almost all crimes," says Brennan, "require that some element of the defendant's intent be established, as do all intentional torts, such as trespass, assault or conversion."

Brennan continues to choke on absolutism in libel as he choked on it in obscenity. And, if he is a balancer, he is a definitional balancer with a bias toward publication per se, prepared to give the preferred freedoms of

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38. Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646 (1972).

39. Zurcher v. Stanford Daily, 436 U.S. 547, 98 S. Ct. 1970 (1978).

speech and press extra weight on the scales because they are, as Cardozo said, the matrix, the indispensable condition of nearly every other form of freedom.

It may be that Brennan, on reflection, will conclude that the approach initiated by him in New York Times, and culminating in the Court's decisions in recent libel cases, will pose the same hazards to fundamental First Amendment values and will forge the same weapon of suppression that he saw growing out of his 1957 Roth opinion.

Brennan's 1965 invocation of Meiklejohn's theory has largely been in vain. Meiklejohn would have extended, at the very least, an absolute privilege to all communication bearing on the public behavior of public officials, and quite likely to the utterances of public figures involved in controversial issues of public importance. Moreover, the Meiklejohnian position would have had to be stormed directly and visibly by post-1964 members of the Court; the actual malice rule has facilitated subterfuge and infiltration against Brennan's "cherished values encased in the First Amendment." And it has disrupted clear thinking about a sliding scale of protection for public as against private speech that the Court might have developed under Brennan's guidance. As it stands, the actual malice test is the story of a failed "theory".